Public Service Company of Oklahoma *and* Local Union No. 1002, International Brotherhood of Electrical Workers, AFL–CIO. Case 17–CA–16248

December 15, 1995

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS BROWNING AND COHEN

On June 21, 1994, Administrative Law Judge Steven M. Charno issued the attached decision. The General Counsel filed exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions[1] and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

We adopt the judge's recommendation to defer to arbitration the complaint allegation that the Respondent engaged in unlawful direct dealing with unit employees at its Northeast Station 3 and 4 (Northeast) facility, even though there is no allegation that the alleged direct dealing was accompanied by any unilateral changes in terms and conditions of employment.

Section 1(A) of article III, ''Company Rights—Union Rights,'' of the 1991–1992 collective-bargaining agreement in effect at the time of the events at issue states in pertinent part that the Union ''is recognized as the sole and exclusive bargaining agency'' for the unit employees. We agree with the judge that, in light of that contractual language, an arbitrator can resolve the allegation of direct dealing at Northeast as effectively as he or she can resolve the allegations of direct dealing at Chickasha and West Metro, deferral of which latter allegations are unopposed here. Thus, an arbitrator can address and decide the questions (1) whether the ELT Follow-Up Committee at Northeast was a ''bargaining agency'' within the meaning of that term as used in section 1(a) of article III of the parties' collective-bargaining agreement, and, if so, (2) whether the Respondent ''recognized'' it as such, in derogation of its contractual promise to recognize the Union as the ''sole and exclusive bargaining agency'' of the unit employees. Contrary to the position of our dissenting colleague, we believe that these issues are not free from doubt, and that they are grist for the arbitral mill.

Contrary to our dissenting colleague, we agree with the judge that an arbitrator has the ability to remedy an instance of direct dealing even where there are no collateral circumstances, such as unilateral changes in terms and conditions of employment, that are alleged (as they were at Chickasha and West Metro in this case) to constitute separate violations of the Act. Thus, as the judge notes, an arbitrator can provide an adequate remedy for unlawful direct dealing, even where there have been no collateral unilateral changes, simply by ordering an employer to honor its contractual obligation to deal exclusively with the recognized union, and to stop dealing directly with employees.

Our dissenting colleague also notes that the ''direct dealing'' allegation is not ''part and parcel'' of a unilateral change allegation. Where, as here, however, each allegation meets the criteria for deferral, we see no reason to deny deferral simply because of the absence of a tie between them.

Finally, our dissenting colleague suggests that the Respondent's conduct constitutes ''a complete rejection of the principles of collective bargaining and the self-organizational rights of employees.'' Although the Respondent's conduct (meeting with an employee committee) may have been unlawful, it was not a complete rejection of bargaining and self-organizational rights, e.g., a complete withdrawal of recognition or an abrogation of an entire contract.

Accordingly, for all of these reasons, we affirm the judge's recommendation to defer all of the unfair labor practice allegations to arbitration.

ORDER

The complaint, as amended, is dismissed, provided that:

Jurisdiction of these proceedings is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that either (a) the disputes have not, with reasonable promptness after the issuance of this Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance and arbitration procedures have not been fair and regular or have reached a result that is repugnant to the Act.

MEMBER BROWNING, dissenting.

Contrary to my colleagues and the judge, I find that the allegation of unlawful activity at the Respondent's Northeast Station 3 and 4 (Northeast) facility is not a proper subject for deferral to arbitration.

[1] Exceptions were filed only to the judge's recommended deferral to arbitration of the allegation that the Respondent violated Sec. 8(a)(5) and (1) of the Act by bypassing the Union and dealing directly with the Employee Leadership Training (ELT) Follow-Up Committee at the Respondent's Northeast Station 3 and 4.

[2] We do not, however, adopt fn. 8 of the judge's decision, and we express no view of the judge's statement about the result he would have reached on the merits of the allegation of direct dealing at Northeast Station 3 and 4 if he had not concluded that deferral of that allegation was appropriate. (In the interest of eliminating possible confusion, however, we note that the judge seems to have inadvertently left out the word ''not'' before the word ''constitute'' in fn. 8.) As the judge himself stated in his next footnote, it is inappropriate to address the merits of a deferred allegation.

The complaint alleges separate and distinct violations of Section 8(a)(5) and (1) of the Act at three separate facilities operated by the Respondent: Chickasha, West Metro, and Northeast. In regard to Chickasha and West Metro, the complaint alleges that the Respondent unlawfully bypassed the Union, dealt directly with unit employees, and, in the context of doing so, made unilateral changes in terms and conditions of employment. In regard to Northeast, however, the complaint alleges only that the Respondent unlawfully bypassed the Union and dealt directly with unit employees, through the Employee Leadership Training (ELT) Follow-Up Committee, concerning terms and conditions of employment; the complaint does not allege any unilateral changes in terms and conditions of employment at Northeast.

The judge recommended that all of the above allegations be deferred to arbitration. There are no exceptions to the judge's recommended deferral of the allegations pertaining to Chickasha and West Metro. The General Counsel has, however, excepted to the judge's recommended deferral of the allegations pertaining to Northeast. Contrary to my colleagues, I find merit in this exception.

In recommending deferral of this allegation, the judge relied in part on the line of precedent in which deferral of *unilateral change* allegations was found appropriate notwithstanding that implementation of those changes involved some direct dealing with employees. But in those cases, the direct-dealing allegations were deemed arbitrable because they were ''part and parcel with the unilateral action allegation,'' and the employer's rights concerning the subject matter of the unilateral change could be resolved under the terms of the parties' agreement.[1]

The judge recognized that there was no unilateral change allegation pertaining to Northeast, and he did not purport to dispute the long-established proposition that for deferral to be appropriate there must be ambiguity in contractual terms the resolution of which can resolve the unfair labor practice allegation.[2] Rather, he found, and my colleagues agree, that the direct-dealing allegation raised a contractual issue under the contract's standard union-recognition clause, which provides that the Union ''is recognized as the sole and exclusive bargaining agency'' for all unit employees. But neither my colleagues nor the judge point to any ambiguity in this contract language that an arbitrator would need to interpret in order to resolve the question whether the Respondent's direct dealing with the ELT Follow-Up Committee undermined the Union in its role as collective-bargaining representative in a manner condemned from the earliest days of the Act.[3] The Respondent does not purport to have been acting on the basis of an interpretation of the collective-bargaining agreement that was contrary to one held by the Union. There is no claim that the contractual union-recognition clause constituted a partial waiver of the Union's statutory right to recognition as the bargaining representative. Indeed, such recognition clauses are contained in most collective-bargaining agreements. Thus, the implications of my colleagues' deferral on these grounds are sweeping.

The 8(a)(5) direct-dealing allegation pertaining to Northeast goes to the very essence of the collective-bargaining relationship between the Respondent and the Union. Direct dealing of the kind alleged to have taken place at Northeast would effectively repudiate the collective-bargaining process,[4] presents no real issue of contract interpretation itself, and, unlike that which is alleged at Chickasha and West Metro, is not ''part and parcel with'' any unilateral changes. Under these circumstances, the desirability of encouraging resort to arbitration simply must yield to the Board's obligation to protect the collective-bargaining process. Consequently, I disagree with my colleagues' deferral of this allegation to arbitration.[5]

[1] *E. I. du Pont & Co.*, 293 NLRB 896, 897 fn. 11 (1989). See also *E. I. du Pont & Co.*, 275 NLRB 693, 695 (1985).

[2] *Struthers Wells Corp.*, 245 NLRB 1170, 1171 fn. 4 (1979); accord: *Hospitality Care Center*, 307 NLRB 1131, 1134 (1992); *American Commercial Lines*, 296 NLRB 622, 623 fn. 8 (1989); *Teamsters Local 284 (Columbus Distributing Co.)*, 296 NLRB 19, 23 (1989); cf. *Textron, Inc.*, 310 NLRB 1209, 1210 fn. 7 (1993) (deferral appropriate when language in letter agreement that supplemented the contract created a question concerning how the contract clause should be interpreted).

[3] *Medo Photo Supply Corp. v. NLRB*, 321 U.S. 678 (1944).

[4] The Board has a long-established policy of refusing to defer when the respondent's conduct constitutes ''a complete rejection of the principles of collective bargaining and the self-organizational rights of employees.'' *Mountain States Construction Co.*, 203 NLRB 1085 (1973). The Board reaffirmed this policy in *United Technologies Corp.*, 268 NLRB 557, 560 (1984). Cf. *Inland Container Corp.*, 298 NLRB 715, 716 fn. 3 (1990).

[5] The allegation of direct-dealing at Northeast is not ''inextricably related'' to the allegations of direct-dealing and unilateral change at Chickasha and West Metro. Accordingly, there is no impediment to affirming the judge's recommendation to defer those allegations while not deferring the allegation pertaining to Northeast. *Clarkson Industries*, 312 NLRB 349, 353 fn. 19 (1993).

Mary G. Taves, Esq., for the General Counsel.
Lynn Paul Mattson, Esq. and *Kristen L. Gordon, Esq. (Doerner, Stuart, Saunders, Daniel & Anderson)*, of Tulsa, Oklahoma, for the Respondent.
Lonnie Sullivan, of Tulsa, Oklahoma, for the Charging Party.

DECISION

STEVEN M. CHARNO, Administrative Law Judge. In response to charges timely filed by Local 1002 of the International Brotherhood of Electrical Workers, AFL–CIO (Union), an amended complaint was issued on May 24, 1993, which alleged that Public Service Company of Oklahoma (Respondent) had violated the National Labor Relations Act

(Act). Respondent's amended answer denied the commission of any unfair labor practice.

A hearing was held before me in Tulsa, Oklahoma, on May 24 and October 5–7, 1993. Initial briefs were thereafter filed by the General Counsel and Respondent under due date of November 26, 1993, and reply briefs were filed by both parties on December 31, 1993.

FINDINGS OF FACT

I. JURISDICTION

Respondent is a public utility engaged in the generation, transmission, and distribution of electricity from various facilities throughout Oklahoma. During the 12 months ending February 28, 1993, Respondent, in the course of its operations, derived gross revenues in excess of $250,000 and purchased and received at its Oklahoma facilities goods valued in excess of $50,000 directly from points outside the State. It is admitted, and I find that, Respondent is an employer engaged in commerce within the meaning of the Act.

The Union is admitted to be, and I find is, a labor organization within the meaning of the Act.

II. DEFERRAL

The amended complaint alleges that Respondent violated Section 8(a)(1) and (5) of the Act by engaging in the following behavior: (1) in April 1992, unilaterally, and without notice to or bargaining with the Union, establishing a rotating schedule for unit employees[1] at its Chickasha facility, and dealing directly with those employees in so doing, (2) in June 1992, unilaterally changing, again without notice to or bargaining with the Union, the overtime callout procedure for unit employees at its West Metro facility, and dealing directly with the employees at that facility to effect the change, and (3) during February through May 1992, dealing directly with unit employees at its Northeast Stations 3 and 4.[2] Respondent denies any violation of the Act and affirmatively defends its discussion and modification of work rules on the ground that each incident should have been deferred to arbitration pursuant to the principles of *Collyer Insulated Wire*, 192 NLRB 837 (1971), and *Textron, Inc.*, 310 NLRB 1209 (1993).

United Technologies Corp., 268 NLRB 557, 558 (1984), and, more recently, *Textron, Inc.*, supra at 1210, hold that

> deferral is appropriate when the following criteria are present: the dispute arose within the confines of a long and productive collective-bargaining relationship; there is no claim of employer animosity to the employees' exercise of protected rights; the parties' contract provided for arbitration in a very broad range of disputes; the arbitration clause clearly encompasses the dispute at issue; the employer has asserted its willingness to utilize arbitration to resolve the dispute; and the dispute is eminently well suited to such resolution.

Since April 1, 1947, Respondent has recognized the Union as the exclusive bargaining representative of its unit employees. This recognition has been embodied in successive collective-bargaining agreements, the most recent of which was effective by its terms from October 1, 1991, to October 1, 1992. That contract sets forth a broad grievance and arbitration procedure. Article II, section 1 indicates that the procedure should be used to resolve questions concerning the ''interpretation, application and operation of this Agreement.'' Article II, section 5 provides that, should discussions between the Union and Respondent fail to resolve a contractual dispute, a ''grievance may then be appealed by either party to Arbitration.'' Section 7 of article II states that the ''decision of the arbitrator shall be final and binding on the parties.'' Based on the foregoing contract language, I find that the collective-bargaining agreement between Respondent and the Union provides for the binding arbitration of disputes arising thereunder.

Accordingly, it must be determined whether the contract governs the terms and conditions of employment that are the subject of this proceeding. With respect to the Chickasha situation, the Union contends that the new rotating schedule for linemen is prohibited by the overtime provisions of article IV, section 3(B) of the contract, and Respondent argues that its right to unilaterally modify such work rules is provided by the contract's management and reserved rights clause in article III, section 3. That provision specifically reserves to Respondent the right to ''make reasonable rules and regulations governing the operation of its business'' and to ''determine the number and starting times of work shifts, subject to the limitations imposed by this Agreement.'' Respondent has placed in the record a number of recent arbitrations of union grievances that address the interpretation of the management- and reserved-rights clause in the context of unilateral changes of work rules and procedures.[3] Turning to the West Metro allegations, the Union asserts that Respondent's callout procedure modification is in contravention of the overtime provisions of article IV, section 3(C) of the contract,[4] while Respondent again relies on its rights under article III, section 3. It is undisputed that the Union previously grieved a callout procedure used by Respondent to regulate line crew overtime. Finally, article III, section 1(A) explicitly provides that the Union is the ''sole and exclusive bargaining agency'' for all unit employees.

Looking to the other criteria set forth in *Textron Lycoming*, I find that (1) Respondent has repeatedly expressed its willingness to arbitrate the matters that are the subject of this proceeding, and there is no reason to believe

[1] The employee unit is defined in art. III, sec. 1(A) of the most recent collective-bargaining agreement between Respondent and the Union as ''all production and maintenance employees in the job and department classifications located in the towns and cities specified in Article VII of this agreement.''

[2] This allegation related to questions directed by unit and nonunit employees to certain of Respondent's management officials concerning terms and conditions of employment, including toolroom staffing and inventory procedures, job postings, and Respondent's appraisal system. Witnesses called by General Counsel testified without contravention that what were arguably unilateral changes in some of these terms and conditions of employment were effected by Respondent after employee questions had been posed. These changes appear to have benefited the unit employees, and General Counsel does not allege that they were violative of the Act.

[3] See American Arbitration Association, Case Nos. 71 300 00187 91, 71 300 00134 91, 71 300 00035 91, and 71 300 00347 90.

[4] Art. IV, sec. 4(D), which governs the payment of overtime to ''stand by'' employees, also appears of relevance.

that Respondent would not comply with any resulting award[5] and (2) the record is devoid of any charge or evidence of animosity by Respondent toward its employees' exercise of their protected rights.[6] For the foregoing reasons, I conclude that the allegations of direct dealing and unilateral change at Respondent's Chickasha and West Metro facilities satisfy the criteria articulated in *United Technologies Corp.*, supra, and *Textron, Inc.*, supra.

The General Counsel argues that a charge of direct dealing can never be deferred to arbitration because an arbitrator is incapable of providing adequate relief for such conduct. It is well established that the alleged existence of direct dealing does not prevent deferral when the dealing is alleged to have resulted in a unilateral change in the terms and conditions of employment. E.g., *E. I. du Pont & Co.*, 293 NLRB 896 (1988). If direct dealing that results in a unilateral change may be deferred to arbitration and if, as the General Counsel contends, an arbitrator cannot adequately remedy direct dealing, it would appear that the Board's prior holdings could be taken to mean that direct dealing need not be remedied at all so long as the discriminatory effects of any resulting change are cured. I reject this construction and conclude that an arbitrator has the ability to remedy an instance of direct dealing, and this ability is not dependent on the presence or absence of any collateral circumstances alleged to constitute a separate violation of the Act.[7] Thus, an arbitrator may provide an adequate remedy, whether or not a unilateral change has taken place, by ordering an employer to honor its contractual obligation to deal exclusively with the recognized union and to stop dealing directly with the employees. I therefore conclude that an arbitrator can remedy the charge of direct dealing at Northeast Station as effectively as he or she may remedy the remaining allegations of direct dealing in this case. Accordingly, I find the final allegation to be a proper subject for deferral.[8] For the foregoing reasons, I shall defer this case to arbitration and dismiss the amended complaint.[9]

Based on the entire record in this proceeding, I issue the following recommended[10]

ORDER

The amended complaint is dismissed, provided that:

Jurisdiction of these proceedings is retained for the limited purpose of entertaining an appropriate and timely motion for further consideration on a proper showing that either (a) the disputes have not, with reasonable promptness after the issuance of this Order, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance and arbitration procedures have not been fair or regular or have reached a result that is repugnant to the Act.

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[5] These findings factually distinguish the instant situation from that found in *Texaco, Inc.*, 233 NLRB 375 (1977), a case relied on by General Counsel. I therefore conclude that that case is without authoritative value here. See *E. I. du Pont & Co.*, 275 NLRB 693, 695 (1985).

[6] Based on the findings set forth in text, I find factually inapposite and reject as persuasive the holding in *Kenosha Auto Transport*, 302 NLRB 888 (1991), a case relied on by the General Counsel.

[7] A contrary conclusion would raise a troubling question under the facts of this case: may the General Counsel effectively preclude deferral of an allegation of direct dealing by failing to allege that the dealing resulted in a unilateral change?

[8] If I had not concluded that deferral of the alleged direct dealing at Northeast Station was appropriate, I would have dismissed the allegation on the ground that Respondent's conduct did constitute ''dealing.'' *E. I. du Pont & Co.*, 311 NLRB 893 (1993).

[9] Having concluded that deferral is required, it would be inappropriate for me to further address the merits. *L. E. Myers Co.*, 270 NLRB 1010 fn. 2 (1984).

[10] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions and recommended Order herein shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.